No. 692

Brief of Macpherson for Resp't.

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Supreme Court of the United States.

MARC HUSSEMY, ... Petitioner

vs.

CAMPBELLSVILLE LUMBER CO., ... Defendant

BRIEF FOR CAMPBELLSVILLE LUMBER CO. ON PETITION FOR CERTIORARI.

Ernest Macpherson,
Counsel

Supreme Court of the United States.

MARC HUBBERT, ... Petitioner,

vs.

CAMPBELLSVILLE LUMBER COMPANY, . . . Defendant.

BRIEF FOR DEFENDANT ON PETITION FOR CERTIORARI.

It is conceived to be appropriate to state the case for the defendant, in order to controvert mistakes in the recital of facts made in the petition for the writ of *certiorari* and in the brief accompanying the petition.

The petitioner, Marc Hubbert, brought a common law action in the circuit court of the United States, for the then district of Kentucky, against Taylor county, Kentucky, on certain coupons of bonds alleged to have been issued by the county, and obtained judgment, by default, for the sum of $2,963.13, with interest thereon at the rate of 6 per centum per annum from the 10th day of April, 1899 (the date of the judgment), until paid. An execution was issued and returned "no property found." In the same case, at a subsequent term of the court, on the 13th day of July, 1900, the plaintiff therein, Marc Hubbert, moved the court to refer the action to a commissioner, with instructions to ascertain and report, on a day to be named, the amount which it would be necessary for the owners or holders of real and personal property in Taylor county, subject to taxation under the revenue laws of the State, to pay, in order to raise promptly in proportion to the value of such property owned by each, a sum sufficient to discharge the judgment and the costs of collecting it; and on the 16th day of July, 1900, the motion was sustained, and in accordance therewith an order was entered, referring the case to a commissioner therein appointed. An objection to

the motion was made by Taylor county and overruled, and thereafter the commissioner made a report, in which he assessed against certain, not all, of the property owners of Taylor county various sums of money, amounting in the aggregate to $14,180.77 (Record, page 95). The commissioner also showed that he had made a publication of a notice of the filing of his report in the Lebanon Enterprise, a newspaper published in Marion county, Kentucky, which notice may be found in the Record at page 95. On the 12th of January, 1901, this report was confirmed (Record, page 24) and a judgment was rendered thereon against all the taxpayers and property holders of Taylor county, named in the report. The judgment declared:

> "It is considered that the said report be, and the same is, hereby approved and confirmed, and that the plaintiff, Marc Hubbert, is entitled to recover judgment against *each of the taxpayers* in said report *for the amounts therein named*, and that at the expiration of ninety days from this date several executions shall issue against *all said perons* who have not *then paid to the marshal of this court* the sums reported to be due by them respectively, which executions may be levied *on any* property subject to taxation for State revenue purposes held by the defendants or which were so held by them at the date of the judgment." (Italics ours.)

By this last judgment Hubbert's original judgment for $2,963.13 with interest thereon at the rate of 6 per centum per annum from the 10th day of April, 1899, was expanded into a judgment in his favor for the sum of $14,180.77. The defendant in error before resorting to these anomalous proceedings never made any demand upon the officers of Taylor county, having control of its fiscal affairs, to assess, levy or collect any tax to pay his first judgment, and never filed a petition for a mandamus.

The record shows that no actual notice of this judgment

was ever given to any of the taxpayers of Taylor county; that no one of them had ever been a party to the action, or had entered his appearance; that no summons or other process was ever issued against any one of these people who were required to pay these moneys to the marshal,, and that if each of the taxpayers had complied with the judgment of the 12th of January, 1901 Marc Hubbert would have received, through the marshal, nearly five times the amount of his original judgment on his coupons.

It appears on the face of the judgment and report, that the commissioner did not assess or levy the sums imposed upon the various property owners in accordance with the rule of uniformity, or "in proportion to the property owned by each taxpayer." Executions on the last judgment were issued against ten (Record, page 103, paragraph 5,) of the property owners of Taylor county, and among these against the Campbellsville Lumber Company, defendant herein, for the sum of $123.76 and costs. These ten executions, if paid, would have satisfied Hubbert's original judgment and costs. The execution was the first knowledge had by the Company of the action or proceeding, and promptly thereupon it moved the court to set aside the judgment against the company, and to quash or recall the execution (Record, page 98). Affidavits in support of the motion were filed by the lumber company (Record, pages 98 to 103.)

It will readily be seen that if the ten taxpayers, including Campbellsville Lumber Company, against whom executions were issued, had promptly settled with the marshal, or with Hubbert, they would thereby have served notice upon other bondholders that these ten stood ready to assume the entire indebtedness of Taylor county; for if they were thus liable to Hubbert, any other holder of bonds or coupons could institute a similar proceeding, obtain judgment without notice, have another like assessment, and issue his execution against the same ten individuals, and this process could be repeated, until they had paid the whole $125,000 of the railroad obligations of the county.

The motion of the Campbellsville Lumber Company to set aside the judgment against it in the circuit court for the Kentucky district was overruled, and by writ of error the case was taken to the United States Circuit Court of Appeals for the Sixth Circuit, which reversed the judgment of the court below.

The proceedings of the petitioner, Hubbert, in the circuit court, were sought to be justified under the provisions of a private and special act of the Legislature of Kentucky, entitled, "An Act to amend an Act entitled 'An Act for the benefit of Taylor county, empowering it to compromise its debts, issue bonds, and levy and collect taxes to pay the same, approved March 18, 1878,' which was approved February 27, 1882." This act is published as an appendix to petitioners' brief at page 18. None of the bonds of Taylor county were issued under this act of 1882.

Several objections were made by Campbellsville Lumber Company to the judgment of the circuit court. The act was "for the purposes of this case" assumed to be constitutional by the Circuit Court of Appeals, which reversed the lower court, however, on one only of the points made by the Lumber Company. The Circuit Court of Appeals held that the act of 1882, under which ten of the two thousand and odd taxpayers of Taylor county could be forced to pay the entire railroad indebtedness of the county was "one of the most stringent and extraordinary acts which has come under our observation;" and that section 10 of the act which reads, "The bonds to be issued under the Act to which this is an amendment shall, on their face, stipulate that the holders of any of them, or any coupon thereof, shall be entitled to the remedies for the collection for the same herein, and in the Act to which this is an amendment, provided for," was mandatory to the extent that in the absence of this stipulation in the bonds the stringent and extraordinary remedies provided in the Act of 1882, were unavailable.

The statement in the petition for the writ of *certiorari* that "the principal ground, and the one upon which the case

turned in the Circuit Court of Appeals, was that the bonds did not contain a stipulation to the effect that the holder should be entitled to the benefit of the provisions of the Act under which they were issued," is erroneous. The bonds were issued under the Act of March 18, 1878, which did not contain the stipulation commanded by the Act of 1882. The Circuit Court of Appeals so decided and the record (page 102) shows the fact and form of the bonds.

In the brief for petitioner it is said at page 7 that "its (the opinion of the Circuit Court of Appeals) practical effect will be to enable the county to continue to repudiate its entire bonded debt of $150,000.00." There is nothing in the opinion to warrant this statement. The Circuit Court of Appeals was careful to say (Record, page 125): "We are not to be understood as casting doubt upon the validity of the bonds as evidence of a valid county indebtedness. No such question is here involved." These bondholders are left with all the remedies given by the laws of Kentucky to other holders of similar municipal obligations. Equally erroneous is the assertion in petitioner's brief (page 9) that "it might be suggested that the proper time for the inhabitants of Taylor county to discuss the enormities of this statute was when *they got the* Legislature to pass it and sold the bonds issued under it." No bonds were ever issued under this Act of 1882; and there is no evidence in the record or elsewhere that the "inhabitants," and particularly Campbellsville Lumber Company, "got the Legislature to pass" the Act, and such is not the fact. The bondholders procured the passage of the Act, and the taxpayers of Taylor county never knew of its existence, until it was resurrected in the circuit court for the Kentucky District.

It is intimated in petitioner's brief that the Circuit Court of Appeals decided that a Federal Court could not enforce a State statute giving a particular remedy for the enforcement of taxes; and Supervisors v. Rogers, 7 Wallace, 175, is cited as sustaining the contrary doctrine. The opinion of the Circuit Court of Appeals (Record, page 120, paragraph 3)

cites and approves the Rogers case. But this question was never argued by counsel for the lumber company and could not arise in the case. It may be proper, however, here to say that the Kentucky courts have uniformly held that the power to assess or levy taxes can not, under the Constitution of this State, be conferred upon a strictly judicial tribunal. Pennington v. Woolfolk, 79 Ky., 16; Slaughter v. City of Louisville, 89 Ky., 121, 122, and in numerous other cases.

It seems to counsel for Campbellsville Lumber Company that under the decisions of this court the petitioner, Marc Hubbert, does not present a case warranting the issuance of the writ of *certiorari*. "It is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a State, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise." Forsyth v. Hammond, 166 U. S., 506.

This case is not important in a monetary sense. It involves only $123.76 and the costs. It does not involve the amount even of Hubbert's claim, for there is nothing in the judgment of the Circuit Court of Appeals to prevent its collection. It does not involve or in any way affect the total bonded indebtedness of Taylor county. The case is not important in any abstract legal way. There is nothing novel in the decision of a court that the provisions of a tax law are mandatory. "All statutes are mandatory which expressly or by implication limit the amount of taxes which may be levied." Cooley on Taxation, 2nd Ed., 429, and see French v. Edwards, 13 Wallace, 506. Lyon v. Alley, 130 U. S., 185.

In passing upon the petition another consideration should not be overlooked. "Marc Hubbert, at the time of the institution of said suit was not a *bona fide* holder or owner of the coupons or bonds upon which he obtained judgment," but "was selected by the bondholders or owners of said bonds and coupons, they being residents of the State of Kentucky,

for the purpose, by a fictitious transfer to him, of obtaining jurisdiction in a Federal Court in Kentucky." Record, page 100, paragraph 5. See Lake v. Dudley, 173 U. S. 243.

The Campbellsville Lumber Company asks that the petition for the writ be denied.

Respectfully submitted,

ERNEST MACPHERSON,

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